in the business itself of furnishing water, but the State does not sprinkle streets or highways, furnish free vaccination, nor in many states maintain any hospital."[42] These two arguments have formed the ground for the majority of the cases exempting the city from liability in the governmental function.

The real basis for the persistent holdings for this doctrine of non-liability is that the courts have been bound by a precedent brought down from history. The need for such a rule no longer exists; the cities are on a firm basis, and are charged with such tremendous powers and are engaged in so many activities which form a menace to the rights of the individual, and, under certain circumstances, deprive him of his safety of property and person. The vast number of employees of the average large city of today greatly increase the risk to the individual, and if such person should happen to suffer loss through the torts of such employees, there would be no recovery under certain circumstances. The governmental functions of the city would be performed in a manner better tending to safety to the individual, if the municipality recognized the law as being that it would be liable for the negligence of its agents; a more responsible type of employee would be engaged, and thus the rights of the public would be to some extent protected. It should be a part of the public policy of the community that the party wronged should have a right of action. Then the question would naturally be: against whom? The answer should be that the action would lie against the principal who made the wrong possible. This should be a part of the protection furnished, in return for taxes and other obligations, by the municipality, to its citizens and to those not its citizens who dwell within its limits. R. B.

CONSTRUCTION OF THE TERM "WITHIN THE COURSE OF THE EMPLOYMENT" UNDER THE WORKMEN'S COMPENSATION ACT.—Most frequently, in cases of the representatives of a deceased employee seeking to show liabiltiy on the part of the employer under the Workmen's Compensation Acts, the case turns on the issue whether or not the accident which caused the death of the employee arose out of and in the course of his employment. Precisely what is to be understood by the phrase "out of and in the course of his employment" is, to say the least, difficult; especially when we attempt to apply this to a given set of facts as a test of liability. It has been said that these acts should be broadly interpreted in accordance with their primary purpose of providing support for those dependent upon a deceased employee.[1]

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[42] "Nature of Governmental Functions", 1 VA. LAW REV. 503.

[1] Coakley *v.* Coakley, 216 Mass. 71, 102 N. E. 930; In re Hurle, 217 Mass. 223, 104 N. E. 336.

In an early case, in interpreting the phrase "course of employment", Justice Wright said:

> "The 'course of employment' in the sense in which it is used in regard to the duties imposed by the particular service, is not to be understood as restricted and confined to the prescribed duties set apart for the performance of the servant. Whatever may be incident to the employment must necessarily belong to it." [2]

In *Priglise* v. *Fonda, etc., R. Co.*,[3] a recently decided case, the facts were as follows: At a railway crossing where deceased was employed by the appellant corporation to protect the public from its trains, there was another track of a different railway corporation parellel to, and about fifty feet from, the track of the appellant. On the occasion of the accident, while the deceased was on duty by the appellant's track, a child stumbled and fell on the track of the other corporation in front of an approaching train. In attempting to rescue the child, the deceased was killed. The court held that the action did not arise out of and in the course of the employment.

The duty of the deceased, in the above case, was to protect the public from accident by trains of the appellant corporation. His position was somewhat that of a public guard—a life-saver. The two crossings were so close together as almost to be a double crossing. In seeing the child about to be run over by a train of the other railway company, the deceased acted in a very commendable manner, and obeyed those instincts which should be most natural to one in the position of a life-saver. Had he quietly kept his seat and suffered the child to be killed, he would most probably have lost his job. But however noble was his act, it neither benefited nor furthered the interest of his employer. Even had he calmly witnessed the death of the child, neither he nor his employer could have been held accountable.

Was, then, the court correct in holding that this accident did not arise out of and in the course of his employment? In *Waters* v. *Taylor*,[4] the deceased, an employee in construction work, met death in an attempt to rescue from a cave-in an employee of a different contractor engaged in other work in the construction. Here the court held that the accident was one arising out of and in the course of the employment. This decision seems sound. For the accident arose while the deceased was at work on the undertaking for which he had been hired, and so in the course of his employment. And it is reasonable to suppose that the employer must have anticipated that the deceased would act as he did should the occasion arise. Surely no employer could expect his employees to remain quietly at work while the life of a

[2] Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.
[3] 183 N. Y. Supp. 414.
[4] 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A 347.

fellow workman was imperiled by a cave-in a few feet away. In this case, the court, speaking through Hiscock, J., said:

> "Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty resting on principles of humanity, and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant to do as Waters did in attempting to rescue a fellow workman although technically working for a different employer. * * *
>
> "And certainly it would be a narrow and disappointing view if in judging the conduct of a workman under the remedial provisions of the Workmen's Compensation Act we should hold that the Legislature intended to deprive him of the benefits of that act because in going to the rescue of another workman under such circumstances as arose here he has stepped somewhat beyond the limits which would fix the scope of his employment under ordinary circumstances."

In *Rees* v. *Thomas*,[5] the plaintiff was injured in an attempt to stop his master's runaway horses. Although his work was wholly unconnected with the horses, it was decided that the accident arose out of and in the course of his employment. And in another case [6] a workman sustained an injury while attempting to regain his pipe, which had fallen. It was held that this action in attempting to recover his pipe was, under the circumstances, reasonable, and the employer was liable. The workman was doing something which a man, while working, may reasonably do. A workman who may reasonably smoke may reasonably drop his pipe, and may reasonably pick it up again.

In *Baum* v. *Industrial Commission*,[7] deceased, who was employed as a shirtwaist cutter, was killed in an attempt to prevent a crowd of strikers from doing injury to his employer. In a very learned opinion, the court held that the act of the deceased was in the scope of his employment, and his personal representatives entitled to compensation under the Workmen's Compensation Act. This case shows that where a workman voluntarily performs an act during an emergency which he has reason to believe is in the interest of his employer, and is injured thereby, he is considered as acting in the scope of his employment.

Again, where the foreman of a repair gang on a much travelled highway, whose work did not require his uninterrupted attention, was injured while crossing the road to speak to a friend who had driven up, the injury arose out of and in the course of his employment within the Workmen's Compensation Act.[8]

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[5] 68 L. J. Rep. 539, 1 Q. B. [1899] 1015.
[6] McLanchlan *v.* Anderson, 4 B. W. C. C. 376.
[7] 288 Ill. 516, 123 N. E. 625.
[8] Robinson *v.* State (Conn.), 104 Atl. 491.

These cases all seem more or less analogous to *Priglise* v. *Fonda, supra,* yet in the latter case the act of the deceased, although clearly reasonable, and certainly to be anticipated by the employer in the event of such opportunity presenting itself, was held not to have arisen out of the employment. It would undoubtedly seem, in *Priglise* v. *Fonda,* that there was at least some incidental connection between the employment and the accident. And in such a case it has been held that even though the connection is somewhat remote, and even where the direct and immediate agency of the injury is foreign, the injury is deemed to have arisen out of the employment.[9] And an accident arises "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is so employed, and at a place where he may reasonably be during that time. The accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it.[10]

T. H. M.

[9] Archibald *v.* Ott, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D 1013; Nisbet *v.* Rayne (1910) 2 K. B. 689; Clem *v.* Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A 352. See also Larke *v.* John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584, where it is said that if the nature of the employment, or the conditions under which it was pursued, or the doing of something incidental to the employment, was a proximate cause of the injury, it arises out of the employment.

[10] Bryant *v.* Fissell, 84 N. J. L. 72, 86 Atl. 458. In Fitzgerald *v.* Clarke (1908) 2 K. B. 796, the court says, "The words 'out of' point to the origin or cause of the accident; the words 'in the course of', to the time, place, manner, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."